No. 97-1846

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In The

Supreme Court of the United States

October Term, 1997

ANTI-MONOPOLY, INC.,

Petitioner,

vs.

HASBRO, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT HASBRO, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GARY L. REBACK
Counsel of Record
DAVID J. BERGER
MARTHE LAROSILIERE
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
650 Page Mill Road
Palo Alto, California 94304-1050
(650) 493-9300

NEAL R. STOLL
PETER S. JULIAN
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Anti-Monopoly, Inc.'s ("AMI" or "Petitioner") Petition for a Writ of Certiorari requests that this Court review the Second Circuit's *per curiam* opinion, affirming the district court's order granting Hasbro, Inc. ("Hasbro") summary judgment on all of AMI's claims. The district court's order was based upon the extensive and undisputed evidence demonstrating that (i) AMI's board game, ANTI-MONOPOLY, failed because consumers did not like it, not because of any wrongdoing on the part of Hasbro; and (ii) Hasbro never engaged in any illegal or improper activity. Based upon this undisputed record, the district court granted Hasbro's motion for summary judgment, finding that "[t]he distinct and significant problem with all of AMI's antitrust claims is that they lack factual support in the record." *See* 26a.[1]

The Court of Appeals for the Second Circuit carefully reviewed AMI's appeal of the district court's findings and order, and reached the same conclusion as the district court. The Second Circuit thus affirmed *per curiam*, the district court's findings and judgment:

> We have considered all of plaintiff's challenges to the district court's rulings and have found in them no basis for reversal. We affirm substantially for the reasons stated in Judge McKenna's Memorandum and Order, reported at 958 F. Supp. 895 (1997).

2a.

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[1] Citations in the form "___a" refer to pages of the Appendix to AMI's Petition for Writ of Certiorari. No separate appendix accompanies this Brief for Respondent in Opposition.

In its petition to this Court, AMI does not raise any novel questions of fact or law, or claim that either the district court or the Second Circuit misapplied existing law. To the contrary, AMI *concedes* the correctness of the lower courts' key factual findings admitting for example, that it "does not have any documents or testimony which states that Hasbro did what it did to put AMI out of business, or to stop sales of ANTI-MONOPOLY." Petition at 21-22. Rather, AMI's petition is based upon its request to this Court to reverse the last fifteen years of antitrust law, beginning with this Court's decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). Because AMI's petition is devoid of any specific challenge to the lower courts' factual findings or legal reasoning, there is no reason or need for this Court to further consider this case. Accordingly, AMI's Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Petitioner, the manufacturer of the board game, ANTI-MONOPOLY, filed this case in 1994 against Hasbro, the second largest toy and game manufacturer in the United States, as well as Toys "R" Us, Inc. and Kmart Corporation, alleging a conspiracy among the three defendants to block AMI from selling the ANTI-MONOPOLY board game in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1-2, Sections 3 and 7 of the Clayton Act, 15 U.S.C. §14; §18, and Section 2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a). Shortly thereafter, the district court denied AMI's motion for a temporary

restraining order blocking Hasbro's acquisition of certain additional game titles. *See* 58a-61a. In June 1995, the district court dismissed several of AMI's facially invalid claims (29a-50a), and a few months later Petitioner voluntarily dismissed with prejudice all of its claims against the other two defendants in return for their production of a few documents.

In the two years that followed, the district court allowed AMI every opportunity to prove its case against Hasbro. Petitioner propounded massive amounts of discovery, including gaining access to more than 500,000 Hasbro documents, deposing and/or identifying more than fifty individuals and obtaining documents from numerous other companies in the toy and game industry.

Following the completion of this extensive discovery, Hasbro moved for summary judgment.[2] In support of its motion, Hasbro submitted the testimony of Petitioner's own distributors and customers, all of whom testified that Petitioner's game failed because consumers did not like it and not because of anything done by Hasbro. The undisputed evidence submitted also demonstrated that Hasbro does not sell its products below cost and thus had not engaged in predatory pricing; and that there are no significant barriers to entry in Petitioner's alleged market.

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[2] Prior to its summary judgment motion, Hasbro had moved for partial judgment on the pleadings to dismiss AMI's secondary-line Robinson-Patman claims on the grounds that as a competitor of Hasbro, AMI does not have antitrust standing to pursue such claims. The district court agreed and granted the motion at the time of its summary judgment ruling. *See* 22a at n. 10.

AMI's opposition to Hasbro's summary judgment motion did not dispute this evidence. Indeed, despite its exhaustive and all-encompassing search for evidence to support its allegations, Petitioner did not (and could not) come forward with *any* evidence of wrongdoing on the part of Hasbro. Consequently, the district court, although liberally construing all of the evidence in AMI's favor and giving AMI every conceivable doubt, held that:

> To the extent that AMI might have antitrust standing, it has failed to provide factual support for its allegations of anticompetitive conduct. . . . Calling the evidence ambiguous would be generous. AMI has not pointed to any exhibits or non-hearsay testimony to support its claim that Hasbro had an express or implied agreement to fix prices with TRU or any other retailer. . . . The distinct and significant problem with all of AMI's antitrust claims is that they lack factual support in the record. Accordingly, all of AMI's antitrust claims are dismissed.

24a-26a.[3]

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[3] The district court also dismissed AMI's one state law claim for tortious interference with business advantage on the grounds that Petitioner also failed to provide any factual support for its state law claim. The court found that:

> AMI has not set forth any particular business relation with which Hasbro has interfered; nor has it set forth any facts that Hasbro intended to harm AMI; nor has it set forth facts to show that Hasbro used dishonest, unfair or improper methods to compete with AMI. Accordingly, AMI's state law claim is dismissed with prejudice.

See 27a (footnote omitted).

AMI's appeal to the Second Circuit was again long on rhetoric but entirely devoid of any evidence to support its allegations, or any claim that the district court had misapplied existing law. The Second Circuit carefully scrutinized AMI's appeal as well as the extensive undisputed factual record developed in the district court. Following lengthy briefing (which included a three-volume appendix of exhibits, consisting of more than 2500 pages of testimony), the court of appeals affirmed the district court's order in a *per curiam* opinion. The Second Circuit panel held that it had "considered all of plaintiff's challenges to the district court's rulings and . . . found in them no basis for reversal." *See* 2a.

AMI's petition does not challenge these findings; rather, it *concedes* them. Petitioner admits that it "does not have any documents or testimony which states that Hasbro did what it did to put AMI out of business, or to stop sales of ANTI-MONOPOLY." Petition at 21-22.

I. THE CERTIORARI PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT A COMPELLING QUESTION.

This Court has stated that a petition for a writ of certiorari will be granted only for "compelling reasons." Sup. Ct. R. 10. For this reason alone, AMI's certiorari petition should be denied. There is absolutely no significant or compelling legal issue raised by the decisions of the lower courts in this case which merit this Court's attention. Rather, the district court as well as the Second Circuit closely scrutinized the undisputed evidence presented and found that "[t]he distinct and significant

problem with all of AMI's antitrust claims is that they lack factual support in the record." *See* 26a. *See also* 2a. In doing so, the courts below did not adopt a new construction or declare a new rule of law that conflicts with decisions of this Court or with those in any other circuits – the general motivating factor in this Court's exercise of certiorari jurisdiction. Sup. Ct. R. 10.

This Court has also long held that it will not grant certiorari when the review sought turns solely upon an analysis of the particular facts of the case rather than some clear overriding legal controversy. *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.) *citing United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176, n. 8 (1981) (Court dismisses writ of certiorari as "improvidently granted" because it was "presented primarily with a question of fact which does not merit Court review"). *See also* Sup. Ct. R. 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). There is no legal controversy present in this matter. Nowhere in the certiorari petition does AMI discuss or even mention any possible legal errors in the judgments below. Rather, Petitioner urges the Court to review the case based on AMI's unsupported allegations – not the record below, which AMI does not cite or discuss – and AMI's argument that the Court should reverse the last fifteen years of antitrust law. *See, e.g.*,

Petition at 16, 19-20 (urging reversal of this Court's decision in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Co., Inc.*, 509 U.S. 209 (1993)).

This Court has been even more reluctant to review factual issues where the court of appeals has confirmed a district court's findings. In such instances, the petitioner must make an extraordinarily clear showing of error before certiorari is granted. As stated by this Court in *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987):

> [With] both courts below having agreed on the facts, we are not inclined to examine the record ourselves absent some extraordinary reason for undertaking this task. . . . A court of law such as this Court . . . cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Id. at 665 (citations omitted). AMI's certiorari petition, completely devoid of citations to any admissible evidence, does not even begin to come close to making an "exceptional showing of error" which would warrant this Court's departure from its established guidelines.

II. THE PETITION SHOULD BE DENIED BECAUSE BOTH THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY APPLIED THIS COURTS' RULINGS AND THE DECISIONS BELOW ARE NOT IN CONFLICT WITH ANY OTHER CIRCUIT.

This Court has made clear that a guiding consideration for review of a case that has been decided by a United States court of appeals is the existence of a conflict

between the decision in question and another decision rendered by another court of appeals or a state court of last resort. *See* Sup. Ct. R. 10(a). Alternatively, review may be granted where the court of appeals has decided "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).[4] The Second Circuit's *per curiam* affirmance of the district court's order granting summary judgment in this case does not give rise to any sort of conflict which calls for the Court to exercise its supervisory power. The district court's decision (and the Second Circuit's affirmance), involved a detailed and thorough review of the undisputed evidence presented and application of well-established legal principles to the factual record. *See* 2a; 3a-28a. In other words, the courts below employed the normal standard of review prescribed by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), in deciding on Hasbro's summary judgment motion.

The lower courts also adhered scrupulously to this Court's substantive antitrust rulings. The district court meticulously applied this Court's holding in *Associated General Contractors of California, Inc. v. California State*

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[4] This Court has also stated that it may choose to exercise certiorari jurisdiction when a court of appeals has "decided an important question of federal law that has not been, but should be settled by this Court." Sup. Ct. R. 10(c). There is no new or unsettled legal issue arising out of this matter. As discussed further below, the lower courts simply applied this Court's stated rules of law in deciding a summary judgment motion in the antitrust context.

Council of Carpenters, 459 U.S. 519 (1983), in finding that AMI did not have antitrust standing (*see* 21a-24a); it relied on this Court's *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) and *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), decisions in finding that AMI cannot sustain a claim for predatory pricing (*see* 23a-24a); and finally, the district court looked to *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), when it held that AMI's antitrust conspiracy charges failed as a result of a lack of any admissible evidence (24a-25a). All of these rulings were reviewed and affirmed by the Second Circuit. *See* 2a.

Similarly, the district court's ruling and the Second Circuit's affirmance are not in conflict with any other circuit courts' decisions on any of these issues. *See, e.g., Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995) (only a disfavored purchaser has standing to claim a secondary-line injury); *Sullivan v. Tagliabue*, 25 F.3d 43 (1st Cir. 1994) (applying *Associated General Contractors'* factors to determine if plaintiff has antitrust standing); *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391 (7th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1993) (party asserting antitrust conspiracy must proffer evidence of such); *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991) (plaintiff's antitrust claims fail because he had no standing and suffered no antitrust injury).

In short, this case does not warrant this Court's time and attention as the law is well established and the lower courts' decisions correctly applied that law to the extensive and undisputed factual record. *See City of Oklahoma v. Tuttle*, 471 U.S. 808, 815-16 (1985) (the "decision to grant

certiorari represents a commitment of scarce judicial resources"). Nothing in AMI's certiorari petition is to the contrary.

CONCLUSION

For the reasons set forth above, Respondent, Hasbro, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

June 17, 1998

Respectfully submitted,

GARY L. REBACK
Counsel of Record
DAVID J. BERGER
MARTHE LAROSILIERE
WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION
650 Page Mill Road
Palo Alto, California 94304-1050
(650) 493-9300

NEAL R. STOLL
PETER S. JULIAN
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Respondent